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SHDKT PROCEEDINGS AND ORDERS DATE: [05/30/91]

CASE NBR: [90107163] CFY STATUS: [DECIDED]
SHORT TITLE: [Herring, Dennis]
VERSUS [United States] DATE DOCKETED: [02/11/91]

PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Feb 11 1991	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Mar 15 1991		Order extending time to file response to petition until April 17, 1991.
5	Apr 17 1991		Brief of respondent United States in opposition filed.
6	Apr 25 1991		DISTRIBUTED. May 9, 1991
8	May 13 1991		REDISTRIBUTED. May 16, 1991
10	May 20 1991		REDISTRIBUTED. May 23, 1991
12	May 28 1991		Petition DENIED. Dissenting opinion by Justice White with whom Justice Blackmun joins. (Detached opinion.)

****

EDITOR'S NOTE:

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ORIGINAL

90-7163

UNITED STATES SUPREME COURT

Supreme Court, U.S.
FILED
FEB 11 1991
JOSEPH F. SPANIOL, JR.
CLERK

RECEIVED
FEB 15 1991
OFFICE OF THE CLERK
SUPREME COURT, U.S.

DENNIS D. HERRING	*	
PETITIONER	*	
V.	*	CASE NO.
UNITED STATES OF AMERICA	*	
RESPONDENT	*	

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
89-7693

MOTION TO PROCEED IN FORMA PAUPERIS

Comes now the Petitioner, by and through undersigned counsel, and moves this Court pursuant to Rule 39, Rules of the Supreme Court, to allow him to proceed in this matter in forma pauperis, and in support thereof states as follows:

1. On May 16, 1989, Susan G. James was appointed by Judge Joel F. Dubina, United States District Judge, to represent the Petitioner at trial level pursuant to the Criminal Justice Act. Said representation continued on appeal to the United States Court of Appeals for the Eleventh Circuit pursuant to 18 USC 3006A(d)(6).

2. On August 17, 1990, the United States Court of Appeals for the Eleventh Circuit entered an order substituting undersigned counsel as court appointed counsel on appeal in place of Susan G. James, to be retroactive to September 15, 1989.

69 pp

Wherefore, Petitioner requests that he be allowed to proceed in this Court in forma pauperis.

Respectfully submitted this 11th day of February, 1991.

Jeffery C. Duffey
Attorney for Petitioner

Law Offices of
Susan G. James &
Jeffery C. Duffey
600 South McDonough Street
Montgomery, Al. 36104
205/269-3330

CERTIFICATE OF SERVICE

I, Jeffery C. Duffey, a member of the Bar of the Supreme Court of the United States and attorney for the Petitioner, hereby certify that on this 11th Day of February, 1991, I placed the foregoing Motion in the United States Mail, First Class, Postage Prepaid, to Hon. Joseph F. Spaniol, Jr., Clerk, United States Supreme Court, 1 First Street, N.E., Washington, D.C. 20543, and I served the correct number of copies of the Motion on Hon. Kent Brunson, AUSA, P. O. Box 197, Montgomery, Al. 36101 and the Solicitor General, Department of Justice, Washington, D.C. 20530 by First Class Postage Prepaid.

Jeffery C. Duffey

ORIGINAL

NO. 90-7163

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DENNIS D. HERRING,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Supreme Court, U.S.
FILED
FEB 11 1991
JOSEPH F. SPANIOL, JR.
CLERK

JEFFERY C. DUFFEY
LAW OFFICES OF
SUSAN G. JAMES AND
JEFFERY C. DUFFEY
ATTORNEY FOR PETITIONER
600 S. MCDONOUGH STREET
MONTGOMERY, AL 36104
205/834-4100

QUESTION PRESENTED

WHERE A CLAIMANT MADE MISREPRESENTATIONS ON HIS APPLICATION FOR STATE OF GEORGIA UNEMPLOYMENT INSURANCE BENEFITS THAT WAS FILED WITH A STATE AGENCY AND RECEIVED BENEFITS CONSISTING OF STATE FUNDS ONLY, THERE IS NO FEDERAL CRIMINAL LIABILITY UNDER TITLE 18 U.S.C. SECTION 1001 (FRAUDULENT MISREPRESENTATION WITHIN JURISDICTION OF FEDERAL DEPARTMENT OR AGENCY).

THE PARTIES

1. The caption in this case contains the name of all parties. The United States Department of Labor and the Georgia Department of Labor would also have an interest in the case.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DENNIS D. HERRING,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS AND ORDERS BELOW

The United States District Court for the Middle District of Alabama, Northern Division, orally denied the Motion to Dismiss Indictment on August 30, 1989, and entered a written order to that effect on September 5, 1989. See Appendix "A". The Order of the same District Court granting a conditional guilty plea and permission to appeal the jurisdictional issue was entered September 5, 1989. See Appendix "B:.

The opinion of the United States Court of Appeals for the Eleventh Circuit entered on November 13, 1990, affirming the order of the United States District Court is reported at United States v. Herring, 916 F.2d 1543 (11th Cir. 1990). See Appendix "C".

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was issued on November 13, 1990, and this Petition is filed within 90 days of said date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

Jurisdiction is also invoked pursuant to Rule 10.1(a), Rules of the Supreme Court: "When a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter." The opinion in Petitioner's case is in direct conflict with United States v. Facchini, 874 F.2d 638 (9th Cir. 1989).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTORY PROVISIONS INVOLVED

(1) 18 U.S.C. Section 1001, which is set out in full in Appendix D.

(2) 18 U.S.C. Section 1919, which is set out in full in Appendix E.

(3) 42 U.S.C. 502, 503, which is set out in full in Appendix F and G.

(4) 34-2-12, Code of Georgia, which is set out in full in Appendix H.

(5) 34-8-17, Code of Georgia, which is set out in fill in Appendix I.

(6) 34-8-70, Code of Georgia, which is set out in full in Appendix J.

(7) 34-8-82, Code of Georgia, which is set out in full in Appendix K.

STATEMENT OF THE CASE

On April 26, 1989, an indictment was filed in the United States District Court for the Middle District of Alabama, Northern Division, charging that Dennis D. Herring "in a matter within the jurisdiction of the United States Department of Labor, a department and agency of the United States, did knowingly and willfully make false, fictitious and fraudulent statements and representations of material facts in that said defendant in executing Form ESA-420, being a form of the Georgia Department of Labor, stated that he had no employment and earnings from employment" during five difference occasions when in fact Dennis D. Herring was employed and had earnings during those occasions. (R1-1-1).

On May 16, 1989, Susan G. James, Esq. was appointed to represent Mr. Herring on this case and on that same date, Mr. Herring entered a plea of not guilty at arraignment. (R1-12-1).

On June 21, 1989, Mr. Herring changed his plea from not guilty to guilty as to Count I of the indictment. Counts II,

III, IV, and V were dismissed on oral motion of the United States Attorney. (R2-2, 5, 7, 9, 10).

On August 1, 1989, Mr. Herring filed a Motion to Continue Sentencing based on discovery of the case of United States v. Facchini, 874 F.2d 638 (9th Cir. 1989), which was decided on May 9, 1989. (R1-20-1). This motion was granted on August 1, 1989. (R3-2). On August 29, 1989, Mr. Herring filed a Motion to Dismiss and Void Guilty Plea on jurisdictional grounds. (R1-22-1).

On August 30, 1989, Mr. Herring's Motion to Dismiss was overruled. His plea of guilty was modified to a conditional plea of guilty to allow the ruling on the Motion to Dismiss to be appealed to the United States Court of Appeals for the Eleventh Circuit. (R4-4) (R1-26-1) (R1-27-1) (Appendix A and B).

On August 30, 1989, Mr. Herring was sentenced to imprisonment for one year. Execution of sentence for imprisonment was suspended, he was placed on probation for two years, subject to general terms and conditions and special conditions that he make restitution in the amount of $870.00 to the Georgia Department of Labor and pay an assessment fee of $50.00 to the United States. (R1-24-1; R4-3).

Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit was filed on Monday, September 11, 1989. (R1-28-1). (10th day was on Saturday).

Jeffery C. Duffey, Esq. was appointed by the Court of Appeals as substitute counsel for Susan G. James, Esq. on August 17, 1990, retroactive to September 15, 1989.

The Court of Appeals affirmed the District Court decision on November 13, 1990. United States v. Herring, 916 F.2d 1543 (11th Cir. 1990).

Defendant Dennis D. Herring is currently on probation and is not incarcerated.

STATEMENT OF THE FACTS

The following statement of the evidence was submitted to the District Court by the parties and approved by the Court pursuant to Rule 10(c) and (3), Federal Rules of Appellate Procedure:

> Dennis Herring applied to the Georgia Department of Labor for unemployment insurance benefits and received the benefits. Herring made false statements on Georgia Form ESA-420 in applying for the benefits. The source of the benefits paid to Herring was from the State of Georgia and not the Federal Government.
>
> The Social Security Act of 1935 initiated the Federal and State Unemployment Insurance System, designed to benefit persons out of work due to no fault of their own. The System is administered for the Federal Government by the State Employment Security Offices. Administrative costs, including salaries and office expenses, of the state workers are funded by the Federal Government. Benefits paid to unemployed workers are financed by taxes on employers, which is supplemented by the United States Treasury when benefit funds are exhausted or when additional funds are authorized as in the case of a national emergency. A worker can file for and receive benefits on an interstate basis.
>
> On or about January 14, 1987, Herring filed his unemployment claim at Carrolton, Georgia, showing that he was separated from his last employment with M.M. Sundt Construction Company, 3948 E. Irvington Road, Tucson, Arizona, on October 6, 1986, for lack of work. In addition to filing his original claim, Herring began

to file continuing weekly claim forms with Georgia for each week he was unemployed. (SR1-1).

SUMMARY OF THE ARGUMENT

WHERE A CLAIMANT MADE MISREPRESENTATIONS ON HIS APPLICATION FOR STATE OF GEORGIA UNEMPLOYMENT INSURANCE BENEFITS THAT WAS FILED WITH A STATE AGENCY AND RECEIVED BENEFITS CONSISTING OF STATE FUNDS ONLY, THERE IS NO FEDERAL CRIMINAL LIABILITY UNDER TITLE 18 U.S.C. SECTION 1001 (FRAUDULENT MISREPRESENTATION WITHIN JURISDICTION OF FEDERAL DEPARTMENT OR AGENCY).

There is no federal jurisdiction pursuant to 18 U.S.C. Section 1001 (Federal False Statements Statutes) to prosecute a person who makes false statements on an application for state unemployment benefits where the United States Secretary of Labor is only authorized to monitor the administrative structure of the state unemployment insurance program and is not empowered to act on fraudulent claims of applicants. United States v. Facchini, 874 F.2d 638 (9th Cir. 1989).

ARGUMENT

I.

WHERE A CLAIMANT MADE MISREPRESENTATIONS ON HIS APPLICATION FOR STATE OF GEORGIA UNEMPLOYMENT INSURANCE BENEFITS THAT WAS FILED WITH A STATE AGENCY AND RECEIVED BENEFITS CONSISTING OF STATE FUNDS ONLY, THERE IS NO FEDERAL CRIMINAL LIABILITY UNDER TITLE 18 U.S.C. SECTION 1001 (FRAUDULENT MISREPRESENTATION WITHIN JURISDICTION OF FEDERAL DEPARTMENT OR AGENCY).

Dennis D. Herring made false statements to the Georgia Department of Labor in his application for State Unemployment Insurance Benefits. As a result of those false statements, Mr. Herring received unemployment insurance benefits from the State of Georgia. The funds he received were State of Georgia funds and not Federal Government funds. (SR1-1). Mr. Herring was

subsequently indicted pursuant to 18 U.S.C. Section 1001. 18 U.S.C. Section 1001 provides that:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Mr. Herring moved to dismiss the indictment on the ground that the indictment did not charge a federal crime citing United States v. Facchini, 874 F.2d 638 (9th Cir. 1989). The motion was denied. Mr. Herring was allowed to plead guilty conditionally reserving the right to appeal the denial of the motion to dismiss. (R4-4) (R1-26, 27-1) (Appendix A and B).

The Federal Government plays a limited role in Georgia's unemployment insurance program. The Federal Government provides funds for administrative purposes and can provide funds for benefits in emergency situations. In the instant case, the source of the benefits paid to Mr. Herring was state funds and not federal funds. (SR1-1).

"There can be no valid conviction under Section 1001 unless both jurisdiction and materiality are shown." United States v. Facchini, 874 F.2d at 641.

United States v. White, 765 F.2d 1469, 1472, 1473 (11th Cir. 1985), gave the following statement regarding standard of proof in 18 U.S.C. Section 1001 cases:

"As we said in United States v. Lichenstein, 610 F.2d at 1278, section 1001 prohibits a false statement:

> that is capable of affecting or influencing the exercise of a government function. United States v. Goldfine, 538 F.2f 815, 820 (9th Cir. 1976); United States v. McGough, 510 F.2d 598, 602 (5th Cir. 1975). That, as here, the government is not actually influenced by the statement is immaterial. Goldfine, 538 F.2d at 820-21. Accord, [United States v.] Beer, 518 F.2d [168] at 172 (5th Cir. 1975)] (dictim). The potential effect on the Government need not involved pecuniary loss. United States v. Gilliland, 312 U.S. 86, 93, 61 S.Ct. 518 [522], 85 L.Ed. 598 (1941); United States v. Krause, 507 F.2d 113, 117 (5th Cir. 1975). The false statement must simply have the capacity to impair or pervert the functioning of a governmental agency. Krause, 507 F.2d at 117-18; United States v. Lambert, 501 F.2d 943, 946 (5th Cir. 1974) (en banc).

JURISDICTION

The Facchini case is directly on point with this case and will be quoted from extensively. As stated in Facchini, (874 F.2d 641-43):

> "To satisfy Section 1001's jurisdiction requirement, the false statement must concern the 'authorized functions of an agency or department' rather than 'matters peripheral to the business of that body'. United States v. Rodgers, 446 U.S. 475, 479, 104 S.Ct. 1942, 1946, 80 L.Ed.2d 492 (1984). 'A department or agency has jurisdiction, in this sense, when it has the power to exercise authority in a particular situation.'
>
> "Even though there may be jurisdiction under section 1001 when the false statement is not made directly to a federal agent...and when the federal agency is not affected financially by the false statement...courts have refused to find jurisdiction unless a direct relationship obtains between the false statement and an authorized function of a federal agency or department..."
>
> "In the instant case, no such direct relation exists between the first group's false statements and an

> authorized function of the Department of Labor. 42 U.S.C. Section 502(a) imposes upon the Secretary the duty to certify the payment of administrative funds to approve state unemployment insurance programs. Under Section 503(a) before the Secretary is authorized to certify payment of such funds, he must review the state's laws and find, inter alia, (1) provisions for '[s]uch methods of administration...as are...reasonably calculated to insure full payment of unemployment compensation when due'; and (2) provisions making 'available upon request' statistical information about recipients of unemployment compensation. 42 U.S.C. Section 503(a)(1), (7) (1982 & Supp. IV 1986). Thus, the secretary is authorized to monitor only the administrative structure of the state program to determine whether it complies with federal requirements. The Secretary is not authorized to monitor the actual operation of the state program. Furthermore, the Secretary does not have the authority to withhold certification of federal administrative funds even if a state pays fraudulent claims. [Footnote 3 omitted]. Thus, fraudulent claims by an applicant for state unemployment benefits cannot pervert the secretary's function of monitoring the legal structure of a state's unemployment insurance program...Because the Secretary is not empowered to act on the fraudulent claims of applicants for state unemployment benefits, such claims do not fall within the jurisdictional reach of section 1001...
>
> ....
>
> "In this case, the federal government does have statutory access to information contained in the appellants' false statement. Under 42 U.S.C. Section 503(a)(7), the Secretary is precluded from certifying any state unemployment insurance program unless state law makes information about benefit claimants available to the Federal Government. Such statements, however, are peripheral to the Secretary's monitoring function because, as we noted, the Secretary is not authorized to act in response to false statements made to a state unemployment insurance program. See 20 C.F.R. Section 601.5(a) (authorizing the Secretary to act when a state improperly denies benefits but not when a state improperly provides benefits). The federal interest in such statements is, therefore, indirect and de minimis."
>
> ....

> "More importantly, the Department of Health and Human Services is specifically authorized to reduce federal funding to a state AFDC program if that state makes payments to ineligible applicants. 45 C.F.R. Section 205.42 (1987). In contrast, the Secretary as we noted above is not authorized to withhold federal administrative funds from a program that pays out benefits not due under state law. See 20 C.F.R. Section 601.5(a). Thus, implicit in the unemployment insurance scheme, as opposed to the AFDC scheme, is a congressional intent to have the states themselves police their payments of unemployment benefits.
>
> "The application of section 1001 to statements made on state claim forms and submitted to a state agency to obtain state funded benefits would extend federal criminal liability for false statements beyond any established precedent."

Although the United States Government provided funds for administrative purposes, the United States Government had no power to administer and enforce the State of Georgia benefits law. Therefore, there was no jurisdiction within the meaning of Section 1001. See: United States v. Herbermann, 583 F.2d 222, 227 (5th Cir. 1978).

"[I]t is well settled that the false statement need not be made directly to a federal agency to sustain a Section 1001 conviction as long as federal funds are involved." United States v. Baker, 626 F.2d 512, 514 (5th Cir. 1980). Federal funds were not involved in this case.

MATERIALITY

The Facchini opinion revealed that in order to find materiality pursuant to Section 1001 "a court must consider whether a statement could, under some set of foreseeable circumstances, significantly affect an action by a federal department or agency." 874 F.2d at 643. In this case, there

was no "intrinsic capability to influence action by the Department of Labor" because the Federal Government's role in the Georgia program is limited. Therefore, the effect of the misrepresentations made by Mr. Herring on the Federal Government is nonexistent. "[S]uch misstatements cannot satisfy Section 1001's materiality requirement." 874 F.2d at 644.

The Facchini case concluded with the statement that "The application of Section 1001 to individuals who have made false statements on state claim forms submitted to a state unemployment office to obtain state-funded benefits would constitute an unprecedented expansion of the scope of federal criminal law." 874 F.2d at 644.

One of the concurring opinions in Facchini stated that to prosecute one for receiving only state funds under 18 U.S.C. Section 1001 would be in violation of the notice requirements of the due process clause of the United States Constitution. No actual notice is given that making a false statement on the application would subject one to federal prosecution nor does the statute give a fair warning of same. 874 F.2d at 644.

Another reason for finding that Section 1001 was not intended to confer federal jurisdiction in fraudulent receipt of state unemployment benefits is the intent of Congress. 18 U.S.C. Section 1919 specifically makes fraudulent claims for federal unemployment benefits a federal crime. 18 U.S.C. Section 1919 was enacted after 18 U.S.C. Section 1001. It is inconceivable to think that Congress believed Section 1001 did

not cover false claims for federal unemployment benefits but intended for Section 1001 to cover false claims for state unemployment benefits.

In Summary:

(1) Mr. Herring applied to the Georgia Department of Labor for the benefits on a State of Georgia form.

(2) Mr. Herring received the benefits from the State of Georgia - the source of funds being state funds and not federal funds.

(3) It is the policy of Georgia to repay all administrative funds received from the Federal Government. 34-8-82, Code of Georgia.

(4) There was no federal involvement with the application or receipt of the funds.

(5) The Secretary of Labor is not empowered to act on fraudulent claims for state benefits and cannot be influenced by false filings.

(6) Without the state law there would be no unemployment benefit scheme in Georgia.

(7) The State of Georgia has its own policing system for its program. 34-2-12, Code of Georgia. False statements to obtain benefits of less than $4,000.00 is a misdemeanor under Georgia law. 34-8-17, Code of Georgia. The benefits came from state taxes. 1965-66 Opinion of the Georgia Attorney General, No. 66-91.

(8) It is the duty of Georgia to administer the Georgia scheme for benefits and it is the duty of the Georgia Commission of Labor to oppose and prevent any further action that would cause complete or substantiated Federalization of Georgia benefits. 34-8-70, Code of Georgia.

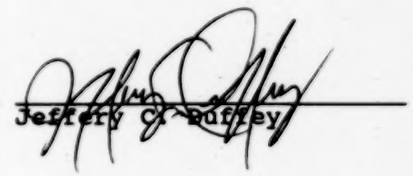
(9) Congress left the states free to deal with possible problems of fraud.

CONCLUSION

Petitioner submits the United States Court of Appeals for the Eleventh Circuit has decided a case in direct conflict with an opinion of the United States Court of Appeals for the Ninth Circuit in a manner repugnant to the United States Constitution and statutory law.

It is important for this Court to exercise its supervisory power to grant the petition for certiorari due to the sheer volume of this type case appearing on federal court dockets for what amounts to violations of state law.

Petitioner prays that this Court will issue the writ of certiorari and will review the matters complained of and reverse the decisions and opinions of the District Court and the Court of Appeals for the Eleventh Circuit.



Jeffrey C. Duffey

CERTIFICATE OF SERVICE

I, Jeffery C. Duffey, a member of the Bar of the Supreme Court of the United States and attorney for Petitioner, hereby certify that on this 11th day of February, 1991, I placed the foregoing Petition in the United States Mail, First Class, Postage Prepaid, to Honorable Joseph F. Spaniol, Jr., Clerk, United States Supreme Court, 1 First Street, N.W., Washington, D.C., 20543, and I served the correct number of copies of the Petition on Kent Brunson, AUSA, P.O. Box 197, Montgomery, Alabama, 36101, and on the Solicitor General, Department of Justice, Washington, D.C., 20530, by First Class Postage Prepaid.

Jeffery C. Duffey
Attorney for Petitioner

Appendix

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
vs.	)	**CR. NO. 89-104-N**
DENNIS HERRING	)	
Defendant	)	

O R D E R

On August 29, 1989, the defendant filed a motion to dismiss the indictment on the basis that it failed to state a crime. The Court orally informed defendant at his sentencing on August 30, 1989 that the Court would deny his motion. Accordingly, defendant's motion is hereby **DENIED**.

DONE and **ORDERED** this 5th day of September, 1989.

[s] Truman Hobbs
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	*	
PLAINTIFF	*	
V.	*	**CASE NO. 89-104-N**
DENNIS HERRING	*	
DEFENDANT	*	

ORDER

Upon consideration of Defendant's Motion to Modify Guilty Plea to Reflect a Conditional Guilty Plea to allow the Defendant to appeal the issue of whether the conduct alleged in the indictment is a crime against the United States, it is

Ordered that Defendant Herring's previous plea of guilt be amended to reflect it to be a conditional guilty plea and the Defendant shall be allowed to appeal the aforesaid issue.

DONE this 5th day of September, 1989.

[s] Truman Hobbs
Hon. Truman N. Hobbs
United States District Judge

cc:
Hon. Ken Brunson
Assistant United States Attorney
P.O. Box 197
Montgomery, Alabama 36101

Susan G. James
Attorney for Defendant
P.O. Box 198
Montgomery, AL 36101

UNITED STATES of America,
Plaintiff-Appellee,

v.

Dennis D. HERRING,
Defendant-Appellant.

No. 89-7693.

United States Court of Appeals,
Eleventh Circuit.

Nov. 13, 1990.

Appeal from the United States District Court for the Middle District of Alabama.

Before JOHNSON AND HATCHETT, Circuit Judges, and SMITH[1], Senior Circuit Judge.

HATCHETT, Circuit Judge:

In this case, we affirm the district court's ruling that 18 U.S.C. Section 1001 is a proper statutory basis for the prosecution of one who receives Georgia Unemployment Insurance benefits as the result of filing false statements in the application for such benefits.

FACTS

On January 14, 1987, Dennis D. Herring, the appellant, applied for unemployment insurance benefits from the Georgia Department of Labor. Herring stated on the application that he left his last job in Tucson, Arizona, for lack of work and was unemployed for the week prior to January 14th. Herring, however,

---

[1]Honorable Edward S. Smith, Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

began working for an Ohio construction company on January 12, 1987.

Based on his original application, Herring made four subsequent requests for and received unemployment compensation from the Georgia Department of Labor while he was gainfully employed. The Georgia Department of Labor paid Herring a total of $870 in unemployment insurance benefits using Georgia state funds. During a Department of Labor investigation involving State Unemployment Insurance Programs, Herring's false statements were discovered. The United States Secretary of Labor has approved Georgia's unemployment program, and Georgia receives federal funding for administrative costs from the United States Secretary of Labor.

PROCEDURAL HISTORY

In April, 1989, a grand jury indicted Herring on five counts of knowingly and willfully making false statements to an agency of the United States, in violation of 18 U.S.C. Section 1001. On June 21, 1989, Herring pleaded not guilty to all counts, and the district court set the case for trial. Five days before trial, Herring pleaded guilty to Count I, and the United States dismissed Counts II through V. The district court set sentencing for August 2, 1989.

On August 1, 1989, the district court granted Herring's motion to continue sentencing upon Herring's discovery of the May 9, 1989, decision in United States v. Facchini, 874 F.2d 638 (9th Cir. 1989). On August 29, 1989, relying on Facchini,

Herring filed a motion to dismiss the indictment for failure to state a crime within the jurisdiction of the United States. The district court denied Herring's motion to dismiss and sentenced him to 2 years probation and $870 in restitution to the Georgia Department of Labor.

On August 31, 1989, Herring filed a motion to modify his guilty plea to a conditional guilty plea. On September 5, 1989, the district court issued a written order denying Herring's motion to dismiss the indictment and changing Herring's plea to a conditional guilty plea.

CONTENTIONS

Herring contends that the district court erred in denying his motion to dismiss the indictment. He argues that 18 U.S.C. Section 1001 does not confer federal jurisdiction to prosecute individuals who make false statements on an application for state unemployment benefits.

The United States contends that the district court correctly denied Herring's motion to dismiss the indictment. The United States argues that federal jurisdiction exists under 18 U.S.C. Section 1001 because the Georgia Department of Labor receives funding from the United States Department of Labor.

ISSUE

Herring presents one issue on appeal: whether the district court erred in denying his motion to dismiss the indictment brought pursuant to 18 U.S.C. Section 1001 for false statements made to the Georgia Department of Labor.

DISCUSSION

Title 18 U.S.C. Section 1001 states in full:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willingly falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or5 representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.

A conviction under section 1001 requires proof of five elements: (1) a statement, (2) falsity, (3) materiality, (4) specific intent, and (5) agency jurisdiction. United States v. Lawson, 809 F.2d 1514, 1517 (11th Cir. 1987) (citing United States v. Lange, 528 F.2d 1280 (5th Cir. 1978)). Only jurisdiction and materiality are at issue in this case.

A. Jurisdiction

Herring contends that the federal government lacks jurisdiction to prosecute him for false statements made to a state agency. According to Herring, jurisdiction exists under section 1001 only upon a showing of a direct relationship between the false statement and an authorized function of the federal agency or department. United States v. Facchini, 874 F.2d 638 (9th Cir. 1989). Relying extensively on Facchini, Herring argues that although the Georgia Department of Labor receives federal funds from the United States Department of Labor for administrative purposes, his false statements did not affect an authorized function of the United States Department of Labor.

In Facchini, the Ninth Circuit, sitting en banc, addressed the application of section 1001 to a similar Department of Labor investigation involving State Unemployment Insurance Programs. The court stated that even though jurisdiction may exist under Section 1001 when the false statement is not made directly to a federal agency and when the federal agency is not financially affected by the false statement, courts have refused to find jurisdiction unless a direct relationship exists between the false statement and an authorized function of a federal agency or department. Facchini at 641. The Ninth Circuit reasoned that although the state received funds from the United States Secretary of Labor, the Secretary is authorized to monitor only the administrative structure of the program and is not empowered to act on fraudulent claims for state unemployment benefits. Facchini at 642. Therefore, false statements to obtain state unemployment funds are not within the proscriptions of section 1001.

In Facchini, the Ninth Circuit narrowly construed the jurisdiction requirement of section 1001 to encompass only false statements with a direct nexus to an authorized function of a federal agency or department. The Ninth Circuit based its jurisdictional conclusion on the technical distinction of the Secretary of Labor's administrative involvement rather than operational involvement in the state unemployment programs. We reject the Ninth Circuit's narrow and technical definition of section 1001 jurisdiction.

Herring cites 18 U.S.C. Section 1919, which makes false statements to obtain unemployment benefits for federal services a federal crime, to further support his lack of jurisdiction argument. Because section 1919 was enacted after section 1001, Herring argues that Congress intended to limit section 1001 to false statements made for federal benefits.

In this case, the Georgia Department of Labor operates under an unemployment law approved by the United States Secretary of Labor. Title 42 U.S.C. Section 502 requires the Secretary to pay administrative funds to approved state unemployment programs from the United States Treasury. (Supp. 1990). Before paying the administrative funds, section 503(a) requires the Secretary to review the state law and find that the state unemployment plan can make full payment of unemployment compensation when due. Section 503 also provides administrative guidelines for state agencies approved under section 502(a). (Supp. 1990).

The Georgia Department of Labor receives federal funds from the United States Department of Labor for administrative costs, including salaries and office expenses. The department is subject to the administrative guidelines of section 503 before receiving federal funds from the Secretary of Labor. Additionally, the unemployed worker, such as Herring, who left his job in Tucson, Arizona, may file for and receive benefits on an interstate basis.

The United States Supreme Court has stated that jurisdiction within the meaning of section 1001 should not be narrowly or

technically defined. United States v. Rodgers, 466 U.S. 475, 480, 104 S.Ct. 1942, 1996, 80 L.Ed.2d 492 (1984). Moreover, this court has held that false statements need not be presented to an agency of the United States and that federal funds need not actually be used to pay a claimant for federal agency jurisdiction to exist under section 1001. United States v. Suggs, 755 F.2d 1538, 1542 (11th Cir. 1985).

In Suggs, the defendant was convicted of falsifying the Georgia Department of Labor travel vouchers in violation of 18 U.S.C. Section 1001. The defendant challenged his conviction on several grounds including lack of jurisdiction. In affirming the conviction, this court found that a state agency's use of federal funds is generally sufficient to establish jurisdiction under section 1001. Suggs, 755 F.2d at 1542 (citing United States v. Baker, 626 F.2d 512, 515 (5th Cir. 1980)). Suggs is controlling.

Furthermore, we find Herring's reliance on the enactment of section 1919 unpersuasive. In United States v. Burnett, 505 F.2d 815, 816 (9th cir. 1974), the court, after examining the legislative history of section 1919, rejected the appellant's argument that section 1919 implicitly repealed the general false statement provision of section 1001. Similarly, we reject Herring's argument that the mere enactment of section 1919, without more, limits section 1001 to false statements made to obtain federal funds.

B. MATERIALITY

Herring next questions the material effects of his statements to the Georgia Department of Labor on the United States government. He argues that his statements did not intrinsically influence the United States Department of Labor's actions because the federal government plays only a limited role in Georgia's unemployment program. Therefore, prosecuting individuals for fraudulent receipt of state funds under section 1001 violates the notice requirement of the due process clause of the United States Constitution.

The test for determining materiality under section 1001 is whether the false statement has the capability of affecting or influencing the exercise of a government function. United States v. Fern, 696 F.2d 1269 (11th Cir. 1983). Materiality is satisfied even if the federal government was not actually influenced by the false statements. Fern at 1273. The false statements need not be made directly to the federal agency to sustain a section 1001 conviction as long as federal funds are involved. United States v. Suggs, 755 F.2d at 1542.

In the instant case, Herring received $870 in state unemployment benefits as a result of his false statements. Payment of fraudulent claims frustrates the function of the Georgia unemployment law because such claims are outside the proper and efficient administration of the law. Additionally, the administrative costs involved in processing and paying Herring's unemployment compensation were paid to the Georgia

Department of Labor by the Secretary of Labor pursuant to 42 U.S.C. Section 502(a). The Secretary has an obligation to ensure that the substantial sums the federal government spends to provide an unemployment compensation program are not depleted through false claims which might misdirect or corrupt the functioning of a governmental agency. Consequently, Herring's false statements to the Georgia Department of Labor had the intrinsic capability of influencing the Secretary of Labor in administering the federal unemployment funds.

We further reject Herring's lack of notice argument. As we stated in Suggs, notice of the federal agency's involvement in the statement unemployment program is not an essential element of a section 1001 conviction.

CONCLUSION

We hold that the district court properly denied Herring's motion to dismiss the indictment. Section 1001 is the proper vehicle for prosecuting individuals who make false statements on applications for state unemployment benefits. Accordingly, we affirm the district court.

AFFIRMED.

18 U.S.C. 1001

Section 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 1919. False statement to obtain unemployment compensation for federal service

Whoever makes a false statement or representation of a material fact knowing it to be false, or knowingly fails to disclose a material fact, to obtain or increase for himself or for any other individual any payment authorized to be paid under chapter 85 of title 5 [5 USCS Section 8501 et seq.] or under an agreement thereunder, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Section 502. Payments to States; computation of amounts

(a) The Board [Secretary of Labor] shall from time to time certify to the Secretary of the Treasury for payment to each State which has an unemployment compensation law approved by the Board [Secretary of Labor] under the Federal Unemployment Tax Act, such amounts as the Board [Secretary of Labor] determines to be necessary for the proper and efficient administration of such law during the fiscal year for which such payment is to be made, including 100 percent of so much of the reasonable expenditures of the States as are attributable to the costs of the implementation and operation of the immigration status verification system described in section 1137(d) [42 USCS Section 1320b-7(d)]. The Board's [Secretary's] determination shall be based on (1) the population of the State; (2) an estimate of the number of persons covered by the State law and of the cost of proper and efficient administration of such law; and (3) such other factors as the Board [Secretary of Labor] finds relevant. The Board [Secretary of Labor] shall not certify for payment under this section in any fiscal year a total amount in excess of the amount appropriated therefor for such fiscal year.

(b) Out of the sums appropriated therefor, the Secretary of the Treasury shall, upon receiving a certification under subsection (a), pay, through the Fiscal Service of the Department of the Treasury and prior to audit of settlement by the General Accounting Office, to the State agency charged with the administration of such law the amount so certified.

42 USCS SECTION 503

Section 503. State laws

(a) Provisions required. The Board [Secretary of Labor] shall; make no certification for payment to any State unless it finds that the law of such States, approved by the Board [Secretary of Labor] under the Federal Unemployment Tax Act, includes provisions for --

(1) Such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Board [Secretary of Labor] shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Board [Secretary of Labor] to be reasonably calculated to insure full payment of unemployment compensation when due; and

(2) Payment of unemployment compensation solely through public employment offices or such other agencies as the Board [Secretary of Labor] may approve; and

(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied; and

(4) The payment of all money received in the unemployment fund of such State (except for refunds of

sums erroneously paid into such fund and except for refunds paid in accordance with the provisions of section 3305(b) of the Federal Unemployment Tax Act [26 USCS Section 3305(b)]), immediately upon such receipt, to the Secretary of the Treasury to the credit of the unemployment trust fund [Unemployment Trust Fund] established by section 904 [42 USCS Section 1104]; and

(5) Expenditure of all money withdrawn from an unemployment fund of such State, in the payment of unemployment compensation, exclusive of expenses of administration, and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 3305(b) of the Federal Unemployment Tax Act [26 USCS Section 3305(b)]: Provided, That an amount equal to the amount of employee payments into the unemployment fund of a State may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration: Provided further, That the amounts specified by section 903(c)(2) [42 USCS Section 1103(c)(2)] may, subject to the conditions prescribed in such section, by used for expenses incurred by the State for administration of its unemployment compensation law and public employment offices: Provided further, That nothing in this

paragraph shall be construed to prohibit deducting an amount from unemployment compensation otherwise payable to an individual and using the amount so deducted to pay for health insurance if the individual elected to have such deduction made and such deduction was made under a program approved by the Secretary of Labor: Provided further, That amounts may be deducted from unemployment benefits and used by repay overpayments as provided in subsection (g); and

(6) The making of such reports, in such form and containing such information, as the Board [Secretary of Labor] may from time to time require, and compliance with such provisions as the Board [Secretary of Labor] may from time to time find necessary to assure the correctness and verification of such reports; and

(7) Making available upon request to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation and employment status of each recipient of unemployment compensation, and a statement of such recipient's rights to further compensation under such law; and

(8) Effective July 1, 1941, the expenditure of all moneys received pursuant to section 302 of this title [42 USCS Section 502] solely for the purposes and in the amounts found necessary by the Board [Secretary of

Labor] for the proper and efficient administration of such State law; and

(9) Effective July 1, 1941, the replacement, within a reasonable time, of any moneys received pursuant to section 302 of this title [42 USCS Section 502], which, because of any action or contingency, have been lost or have been expended for purposes other than, or in amounts in excess of, those found necessary by the Board [Secretary of Labor] for the proper administration of such State law.

(b) Failure to comply; payments stopped. Whenever the Board [Secretary of Labor], after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law, finds that in the administration of the law there is --

(1) a denial, in a substantial number of cases, of unemployment compensation to individuals entitled thereto under such law; or

(2) a failure to comply substantially with any provision specified in subsection (a);

the Board [Secretary of Labor] shall notify such State agency that further payments will not be made to the State until the Board [Secretary of Labor] is satisfied that there is no longer any such denial or failure to comply. Until it is so satisfied it shall make no further certification to the Secretary of the Treasure with respect to such State: Provided, That there shall

be no finding under clause (1) until the question of entitlement shall have been decided by the highest judicial authority given jurisdiction under such State law: Provided further, That any costs may be paid with respect to any claimant by a State and included as costs of administration of its law.

(c) Denial of certification; availability of records to Railroad Retirement Board; cooperation with Federal agencies. The Board [Secretary of Labor] shall make no certification for payment to any State if it finds, after reasonable notice and opportunity for hearing to the State agency charted with the administration of the State law --

(1) that such State does not make its records available to the Railroad Retirement Board, and furnish to the Railroad Retirement Board at the expense of the Railroad Retirement Board such copies thereof as the Railroad Retirement Board deems necessary for its purposes;

(2) that such State is failing to afford reasonable cooperation with every agency of the United States charged with the administration of any unemployment insurance law; or

(3) that any interest required to be paid on advances under title XII of this Act [42 USCS Section 1321 et seq.] has not been paid by the date on which such interest is required to be paid or has been paid directly or indirectly (by an equivalent reduction in

State unemployment taxes or otherwise) by such State from amounts in such State's unemployment fund, until such interest is properly paid.

(d) Disclosure of unemployment compensation information; deduction and withholding of amounts owed to State food stamp agencies; reimbursement of administrative costs; non-compliance of state agency. (1) The State agency charged with the administration of the State law --

(A) shall disclose, upon request and on a reimbursable basis, to officers and employees of the Department of Agriculture and to officers or employees of any State food stamp agency any of the following information contained in the records of such State agency--

(i) wage information,

(ii) whether an individual is receiving, has received, or has made application for, unemployment compensation, and the amount of any such compensation being received (or to be received) by such individual,

(iii) the current (or most recent) home address or such individual, and

(iv) whether an individual has refused an offer of employment and, if so, a description of the employment so offered and the terms, conditions, and rate of pay therefor, and

(B) shall establish such safeguards as are necessary (as determined by the Secretary of Labor in regulations) to insure that information disclosed under subparagraph (A) is used only for purposes of determining an individual's eligibility for benefits, or the amount of benefits, under the food stamp program established under the Food Stamp Act of 1977.

(2)(A) For purposes of this paragraph, the term "unemployment compensation" means any unemployment compensation payable under the State law (including amounts payable pursuant to an agreement under a Federal unemployment compensation law).

(B) The State agency charged with the administration of the State law--

(i) may require each new applicant for unemployment compensation to disclose whether the application owed an uncollected overissuance (as defined in section 13(c)(1) of the Food Stamp Act of 1977) [7 USCS Section 2022(c)(1) of food stamp coupons,

(ii) may notify the State food stamp agency to which the uncollected overissuance is owed that the applicant has been determined to be eligible for unemployment compensation if the applicant discloses under clause (i) that the applicant owes an uncollected overissuance

and the applicant is determined to be so eligible,

(iii) may deduct and withhold from any unemployment compensation otherwise payable to an individual--

(I) the amount specified by the individual to the State agency to be deducted and withheld under this clause,

(II) the amount (if any) determined pursuant to an agreement submitted to the State food stamp agency under section 13(c)(3)(A) of the Food Stamp At of 1977 [7 USCS Section 2022(c)(3)(A)], or

(III) any amount otherwise required to be deducted and withheld from the unemployment compensation pursuant to section 13(c)(3)(B) of such Act [7 USCS Section 2022(c)(3)(B)], and

(iv) shall pay any amount deducted and withheld under clause (iii) to the appropriate State food stamp agency.

(C) Any amount deducted and withheld under subparagraph (B)(iii) shall for all purposes be treated as if it were paid to the individual as unemployment compensation and paid by the individual to the State food stamp agency to which the uncollected overissuance is owed as repayment of the individual's uncollected overissuance.

(D) A State food stamp agency to which an uncollected overissuance is owed shall reimburse the State agency charged with the administration of the State unemployment compensation law for the administrative costs incurred by the State agency under this paragraph that are attributable to repayment of uncollected overissuance to the State food stamp agency to which the uncollected overissuance is owed.

(3) Whenever the Secretary of Labor, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law, finds that there is a failure to comply substantially with the requirements of paragraph (1), the Secretary of Labor shall notify such State agency that further payments will not be made to the State until he is satisfied that there is no longer any such failure.

Until the Secretary of Labor is so satisfied, he shall make no further certification to the Secretary of the 3Treasure with respect to such State.

(4) For purposes of this subsection, the term "State food stamp Agency" means any agency described in section 3(n)(1) of the Food Stamp Act of 1977 [7 USCS Section 2012(n)(1)] which administers the food stamp program established under such Act.

(e) Disclosure of wage information; non-compliance of State agency. (1) The State agency charged with the administration of the State law--

(A) shall disclose, upon request and on a reimbursable basis, directly to officers or employees of any State or local child support enforcement agency any wage information contained in the records of such State agency, and

(B) shall establish such safeguards as are necessary (as determined by the Secretary of Labor) to insure that information disclosed under subparagraph (A) is used only for purposes of establishing and collecting child support obligations from, and locating, individuals owing such obligations.

For purposes of this subsection, the term "child support obligations" only includes obligations which are being enforced pursuant to a plan described in section 454 of this Act, [42 USCS Section 654] which has been approved by the Secretary of Health

and Human Services under part D of title IV of this Act [42 USCS Section 651 et seq.].

(2)(A) the State agency charged with the administration of the State law--

(i) shall require each new applicant for unemployment compensation to disclose whether or not such applicant owes child support obligations (as defined in the last sentence of paragraph (1)),

(ii) shall notify the State or local child support enforcement agency enforcing such obligations, if any applicant discloses under clause

(i) that he owes child support obligations and he is determined to be eligible for unemployment compensation, that such applicant has been so determined to be eligible,

(iii) shall deduct and withheld from any unemployment compensation otherwise payable to an individual--

(I) the amount specified by the individual to the State agency to be deducted and withheld under this clause,

(II) the amount (if any) determined pursuant to an agreement submitted to the State agency under section 454(19)(B)(i) of this Acct [42 USCS Section 654(19)(B)(i)], or

(III) any amount otherwise required to be so deducted and withheld from such unemployment compensation through legal process (as defined in section 462(e) [42 USCS Section 662(e)]), and

(iv) shall pay any amount deducted and withheld under clause (iii) to the appropriate State or local child support enforcement agency.

Any amount deducted and withheld under clause (iii) shall for all purposes be treated as if it were paid to the individual as unemployment compensation and paid by such individual to the State or local child support enforcement agency in satisfaction of his child support obligations.

(B) For purposes of this paragraph, the term "unemployment compensation" means any compensation payable under the State law (including amounts payable pursuant to agreements under any Federal unemployment compensation law).

(C) Each State or local child support enforcement agency shall reimburse the State agency charged with the administration of the State employment compensation law for the administrative costs incurred by such State agency under this paragraph which are attributable to child support obligations being enforced by the State or local child support enforcement agency.

(3) Whenever the Secretary of Labor, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law, finds that there is failure to comply substantially with the requirements of paragraph (1) or (2), the Secretary of Labor shall notify such State agency that further payments will not be made to the State until he is satisfied that there is no longer any such failure. Until the Secretary of Labor is so satisfied, he shall make no further certification to the Secretary of the Treasury with respect to such State.

(4) For purposes of this subsection, the term "State or local child support enforcement agency" means any agency of a State or political subdivision thereof operating pursuant to a plan described in the last sentence of paragraph (1).

(f) Income and eligibility verification system. The State agency charged with the administration of the State law shall provide that information shall be requested and exchanged for

purposes of income and eligibility verification in accordance with a State system which meets the requirements of section 1137 of this Act. [42 USCS Section 1320b-7].

(g) Deduction of overpayment. (1) A State may deduct from unemployment benefits otherwise payable to an individual an amount equal to any overpayment made to such individual under an unemployment benefit program of the United States or any other State, and not previously recovered. The amount so deducted shall be paid to the jurisdiction under whose program such overpayment was made. Any such deduction shall be made only in accordance with the same procedures relating to notice and opportunity for a hearing as apply to the recovery of overpayments of regular unemployment compensation paid by such State.

(2) Any State may enter into an agreement with the Secretary of Labor under which--

(A) the State agrees to recover from unemployment benefits otherwise payable to an individual by such State any overpayments made under an unemployment benefit program of the United States to such individual and not previously recovered, in accordance with paragraph (1), and to pay such amounts recovered to the United States for credit to the appropriate accounts, and

(B) the United States agrees to allow the State to recover from unemployment benefits otherwise payable to an individual under an unemployment benefit program of the United States any overpayments made by such State to such individual under a State unemployment benefit program and not previously recovered, in accordance with the same procedures as apply under paragraph (1).

(3) For purposes of this subsection, "unemployment benefits" means unemployment compensation, trade adjustment allowances, and other unemployment assistance.

34-2-12. Duty of Attorney General and district attorneys to prosecute violations of those laws enforced by Commissioner.

It shall be the duty of the Attorney General of the state and the district attorneys of their respective judicial circuits, upon request of the Commissioner of Labor or any of his authorized representatives, to prosecute any violation of the law which is made the duty of the Commissioner to enforce.

34-8-17. Penalties for violations of chapter or rules, regulations, or orders thereunder.

(a) Any person who knowingly makes a false representation or knowingly fails to disclose a material fact to obtain or increase any benefit or payment under this chapter or under an employment insurance act of any other state or government, either for himself or for any other person, whether such benefit or payment is actually received or not, upon conviction shall be guilty of a misdemeanor; and each such false representation or failure to disclose a material fact shall constitute a separate offense; provided, however, that if a false representation or failure to disclose a material fact occurs with respect to more than one claim, which claim was made in more than one benefit year, or if the benefits received under this chapter which were the subject of a false representation or failure to disclose a material fact exceed $4,000.00, any such person shall upon conviciton be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years.

(b) Any employing unit or any officer or agent of an employing unit or any other person who makes a false statement or representation, knowing it to be false, or who knowingly fails to disclose a material fact in order to prevent or reduce the payment of benefits to any individual entitled thereto or to avoid becoming or remaining subject to this chapter or to avoid or reduce any contribution or other payment required from an

employing unit under this chapter or who willfully fails or refuses to make any such contributions or other payment or to furnish any reports required under this chapter or to produce or permit the inspection or copying of records as required hereunder shall upon conviction be guilty of a misdemeanor; and each such false statement or representation or failure to disclose a material fact and each day of such failure or refusal shall constitute a separate offense.

(c) Any person who establishes a fictitious employing unit for the purpose of enabling such person or other person to receive benefits under this chapter to which such person is not entitled shall upon conviction be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years.

(d) Any person who willfully violates any provision of this chapter or any order, rule, or regulation thereunder, the violation of which is made unlawful or the observance of which is required under the terms of this chapter and for which a penalty is neither prescribed herein nor provided by any other applicable provision of this Code section, shall upon conviction be guilty of a misdemeanor; and each day such violation continues shall be deemed to be a separate offense.

34-8-70. Duties and powers of Commissioner with respect to chapter.

(a) It shall be the duty of the Commissioner to administer this chapter.

(b) The Commissioner shall have power and authority to adopt, amend, or rescind such rules and regulations and to employ such persons, make such expenditures, require such reports, make such investigations, and take such other action as he deems necessary or suitable to that end, and such rules and regulations shall be effective upon publication in the manner, not inconsistent with this chapter, which the Commission shall prescribe.

(c) The Commissioner shall determine his own methods of organization and procedure in accordance with this chapter and shall have an official seal, which shall be judicially noticed.

(d) Not later than February 1 of each year, the Commissioner shall submit to the Governor a report covering the administration and operation of this chapter during the preceding fiscal year and shall make such recommendations for amendments to this chapter as he deems proper. Such report shall include a balance sheet of the moneys in the fund in which there shall be provided, if possible, a reserve against the liability in the future years to pay benefits in excess of the then current contributions, which reserve shall be established by the Commissioner in accordance with accepted actuarial principles on

the basis of statistics regarding employment, business activity, and other relevant factors for the longest possible period.

(e) Whenever the Commissioner believes that a change in contribution or benefit rates will become necessary to protect the solvency of the fund, he shall promptly so inform the Governor and the General Assembly and make recommendations with respect thereto.

(f) The Commissioner shall fully cooperate with the agencies of other states and shall make every proper effort within his means to oppose and prevent any further action which would in his judgment tend to effect complete or substantial federalization of state unemployment compensation funds or state employment security programs. In addition, the Commissioner may make and may cooperate with other appropriate agencies in making studies as to the practicability and probable cost of possible new state administered social security programs and the relative desirability of state (rather than federal) action in any such field.

34-8-82. State reimbursement of Employment Security Administration Fund for moneys lost, wrongfully expended, or over-expended.

This state recognizes its obligation to replace and declares it to be the policy of this state that funds will be provided in the future and applied to the replacement of any moneys received after July 1, 1941, from the United States Secretary of Labor or the federal official responsible for the allocation of funds for the administration of this chapter and for making other administrative determinations within the federal province under Title III of the Social Security Act; any unencumbered balances in the Employment Security Administration Fund as of that date; any moneys thereafter granted to this state pursuant to the provisions of the Wagner-Peyser Act; and any moneys made available by the state or its political subdivisions and matched by such moneys granted this state pursuant to the provisions of the Wagner-Peyser Act, which the secretary of labor or other federal official above described finds, because of any action or contingency, have been lost or have been expended for purposes other than or in amounts in excess of those found necessary by the secretary of labor or other federal official above-described. Such moneys shall be promptly replaced by moneys appropriated for such purpose from the general funds of this state to the Employment Security Administration Fund for expenditure as provided in Code Section 34-8-81. The Commissioner shall promptly report to the Governor, and the Governor to the

legislature, the amount required for such replacement. This Code section shall be continued to relieve this state of its obligation with respect to funds received prior to July 1, 1941, pursuant to the provisions of Title III of the Social Security act.

ORIGINAL

No. 90-7163 (3)

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

DENNIS D. HERRING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

ANDREW LEVCHUK
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1001, which proscribes false statements "in any matter within the jurisdiction of" federal agencies, covers a false statement on an application for unemployment benefits from the Georgia Unemployment Compensation Fund, which has been created and administered under the supervision and authority of the United States Department of Labor.

2. Whether petitioner's false statement was "material" under Section 1001.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20-28) is reported at 916 F.2d 1543. The order of the district court denying petitioner's motion to dismiss the indictment (Pet. App. 16) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1990. The petition for a writ of certiorari was filed on February 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional plea of guilty in the United States District Court for the Middle District of Alabama, petitioner was convicted on one count of making a false statement in a matter within the jurisdiction of a department or agency of the United States, namely, making a false statement on an application for unemployment benefits to a Georgia program approved and supervised by the United States Department of Labor, in violation of 18 U.S.C. 1001. The trial court imposed a suspended sentence of one year in prison and two years' probation. The court of appeals affirmed (Pet. App. 20-28).

1. Pursuant to the Federal Unemployment Tax Act, 26 U.S.C. 3301-3311, and certain provisions of the Social Security Act, 42 U.S.C. 501-504, 1101-1109, the United States Department of Labor supervises and provides administrative and financial assistance to state unemployment benefit programs approved by the Secretary of Labor. Georgia has established such a program and administers it through two funds. Unemployment benefits are paid out of the Georgia Unemployment Compensation Fund, Ga. Code Ann. §§ 34-8-100 to 34-8-102 (1988), which is maintained primarily through contributions from Georgia employers, Ga. Code Ann. §§ 34-8-120 to 34-8-122 (1988 & Supp. 1990). A separate fund, the Employment Security Administration Fund, defrays the administrative costs of the Georgia program. Ga. Code Ann. § 34-8-81 (1988). The federal government contributes to that fund to assist with the Georgia program's "proper and efficient administration," 42

U.S.C. 502(a). The federal contribution generally covers administrative costs, including such items as salary and office expenses. Pet. App. 25.

In order to ensure that the federal funds are expended only on programs that further the national interest in compensating the unemployed, the Social Security Act sets forth a detailed list of requirements with which the state plans must comply. See 42 U.S.C. 503(a). Among other things, Section 503(a) requires a merit-based employment system, exclusive use of public employment offices, and a fair hearing system for challenges to denials of benefits. Section 503(a)(1)-(3). All funds received for the state compensation fund must be paid over to the Secretary of the Treasury to be held in the federal unemployment trust fund established under Section 1104. Section 503(a)(4). Funds are then disbursed from that fund to the state compensation fund for the payment of unemployment compensation benefits. With minor exceptions not relevant here, money from the state compensation fund cannot be expended other than as compensation for unemployment. Section 503(a)(5). As the State expends funds to compensate the unemployed, the State requests funds from the Secretary of the Treasury; the Secretary is authorized to remit to the State such funds "as it may duly requisition." Section 1104(f).

To ensure that the state program complies with these requirements, Section 503(a)(6) requires the State to make "such reports * * * as the Secretary of Labor may from time to time

require, and compl[y] with such provisions as the Secretary of Labor may from time to time find necessary to assure the correctness and verification of such reports." Similarly, the plan must make "available upon request to any agency of the United States charged with * * * assistance through public employment, the name, address, ordinary occupation and employment status of each recipient of unemployment compensation." Section 503(a)(7). If the State "fail[s] to comply substantially with" any of the provisions discussed above, the Secretary of Labor can direct the Secretary of the Treasury to cease making payments to the State. Section 503(b)(2).

The statute establishing the Georgia program in turn grants a dominant role to the United States Department of Labor. One section of that statute, Ga. Code Ann. § 34-8-79 (1988), instructs the Georgia Commissioner of Labor to "cooperate, to the fullest extent consistent with this chapter, with the United States Secretary of Labor and the federal official responsible for the allocation of funds for the administration of this chapter." Section 34-8-79 further requires the Georgia Commissioner -- in terms mirroring the terms of 42 U.S.C. 503(a)(6) -- to

> make such reports in such form and containing such information as the secretary of labor * * * may from time to time require and * * * comply with such provisions as the secretary of labor * * * may from time to time find necessary to assure the correctness and verification of such reports; and [to] comply with the regulations prescribed by the secretary of labor * * * governing the expenditure of such sums as may be allotted and paid to this state under [this program].

In sum, as this Court has recognized, the coordination of state unemployment programs with the efforts of the Department of Labor, as mandated by the Social Security Act, in effect establishes a "unitary plan for unemployment relief" and "a cooperative endeavor" between the States and the federal government. Buckstaff Bath House Co. v. McKinley, 308 U.S. 358, 363 (1939).

2. In January 1987, petitioner applied to the Georgia Department of Labor for unemployment benefits. Petitioner falsely stated on the application form that he had been unemployed since October 1986, when in fact he began working for a construction firm two days before he filed his application. Petitioner repeated the same false statements on four additional requests for unemployment compensation, even though he was gainfully employed when he filed those applications as well. Because of these false representations, the Georgia Department of Labor paid petitioner a total of $870.00 in unemployment benefits, using funds from the Georgia Unemployment Compensation Fund, Pet. App. 20-21, which in turn had been disbursed by the Secretary of the Treasury from the federal unemployment trust fund.

3. Petitioner initially pleaded guilty, but before sentencing became aware of the Ninth Circuit's decision in United States v. Facchini, 874 F.2d 638 (1989) (en banc), which held

that 18 U.S.C. 1001 did not apply to a similar transaction.[1] The district court rejected petitioner's claim that Facchini barred his prosecution, but agreed to allow petitioner to change his plea to a conditional plea pursuant to Fed. R. Crim. P. 11(a)(2), which allowed petitioner to raise the Facchini issue on appeal. Pet. App. 21-22.

4. Relying upon Facchini, petitioner argued on appeal that his false statements did not concern a "matter within the jurisdiction of any department or agency of the United States," 18 U.S.C. 1001.[2] The court of appeals nevertheless affirmed, expressly rejecting what it termed "the Ninth Circuit's narrow and technical definition of section 1001 jurisdiction." Pet. App. 24. In light of the Department of Labor's authority over

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[1]The Ninth Circuit held in Facchini that false statements on applications seeking benefits from Oregon's unemployment insurance program did not fall within the jurisdiction of the United States Department of Labor, primarily because the Secretary of Labor was authorized to monitor only the administrative structure of the unemployment benefits program and because "not one cent of federal money goes to pay the unemployment benefits," 874 F.2d at 640. The Ninth Circuit also relied on its perception that, "[b]ecause the Secretary is not empowered to act on the fraudulent claims of applicants for state unemployment benefits, such claims do not fall within the jurisdictional reach of section 1001." Id. at 642.

[2]18 U.S.C. 1001 provides that:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Georgia's receipt of assistance and administrative funds for its program, the court of appeals concluded that the false statements on petitioner's benefits application concerned matters within the jurisdiction of the Secretary of Labor. Id. at 24-26.

The court of appeals took note of this Court's admonition that "jurisdiction" within the meaning of Section 1001 should not be narrowly or technically defined. Pet. App. 25-26 (citing United States v. Rodgers, 466 U.S. 475, 480 (1984)). The court observed that before a state benefit program receives federal assistance under 42 U.S.C. 502, the State must satisfy the Secretary of Labor that the program meets the guidelines set forth in Section 503(a). The Georgia program had been approved under the criteria set forth in Section 503(a), and had received funds from the United States Department of Labor for administrative costs, including salaries and office expenses. Pet. App. 25. In light of the role of the Department of Labor in the operation of the state program, the court of appeals concluded that false statements made to the Georgia unemployment benefit funds were statements made "in a matter within the jurisdiction of" the Secretary of Labor. Id. at 25-26.

The court of appeals likewise rejected petitioner's claim that his false statements were not material within the meaning of Section 1001. Pet. App. 27-28. The court found that a false statement is material under Section 1001 if it can affect or influence the exercise of a government function. Id. at 27. The court then observed that the Secretary of Labor could be

influenced by false statements to the Georgia Department of Labor given her "obligation to ensure that the substantial sums the federal government spends to provide an unemployment program are not depleted through false claims which might misdirect or corrupt the functioning of a governmental agency." Pet. App. 28.[3/]

ARGUMENT

Although we agree with petitioner that the court of appeals' opinion conflicts with the opinion of the Ninth Circuit sitting en banc in United States v. Facchini, 874 F.2d 638 (1989), we do not believe this case merits review by this Court. First, the issue raised by the petition has arisen very infrequently. In fact, this case and Facchini are the only two court of appeals decisions of which we are aware that address the issue of the applicability of Section 1001 to false statements made to a State that is operating an unemployment compensation fund pursuant to the Federal Unemployment Tax Act and the Social Security Act.

What is more, the issue is unlikely to arise in the future. We have been advised by the Criminal Division of the Department of Justice that the only Section 1001 investigations known to it for false statements on unemployment compensation applications were initiated by the Inspector General of the Department of

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[3/]The court of appeals also rejected petitioner's claim that he was entitled to notice of the Department of Labor's jurisdiction over the Georgia unemployment program. Pet. App. 28. Petitioner does not renew that claim in this Court.

Labor. The Department of Justice subsequently has determined that it is inappropriate for the Inspector General to investigate such crimes, and we do not anticipate that any new prosecutions will be initiated under Section 1001 for false statements on applications for unemployment compensation.

Finally, for the reasons we discuss in detail below, we believe that the decision in this case is correct and that the Ninth Circuit's decision is erroneous, resting on a misunderstanding of the scope of federal authority in the supervision and operation of state unemployment compensation programs. Petitioner therefore will suffer no injustice if this Court declines to review his conviction.

1. The issue in this case is whether petitioner's statement was made "in a matter within the jurisdiction of" a federal agency for purposes of Section 1001. Interpreting that phrase, this Court has explained that

> [t]he most natural, nontechnical reading of the statutory language is that it covers all matters confided to the authority of an agency or department. Thus, Webster's Third New International Dictionary 1227 (1976) broadly defines "jurisdiction" as, among other things, "the limits or territory within which any particular power may be exercised: sphere of authority."

United States v. Rodgers, 466 U.S. 475, 479 (1984) (citation omitted). The Court acknowledged the existence of "narrower, more technical meanings of the term 'jurisdiction,'" but rejected them, explaining that "a narrow, technical definition * * * clashes strongly with the sweeping, every-day language on either

side of the term." Id. at 480; see Bryson v. United States, 396 U.S. 64, 70 (1969) ("the term 'jurisdiction' should not be given a narrow or technical meaning for purposes of § 1001"); United States v. Bramblett, 348 U.S. 503, 509-510 (1955) (explaining, in a case under Section 1001, that "criminal statutes are to be construed strictly," but "this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature").

In its first case interpreting Section 1001, this Court established that a matter could fall within the jurisdiction of a federal agency even if the false statement did not cause any loss of federal funds. United States v. Gilliland, 312 U.S. 86, 91-95 (1941) (false statements to a federal board set up to prevent transportation in interstate commerce of petroleum produced in violation of state laws). Similarly, it is well established in a variety of contexts that Section 1001 is not limited to statements that are made to federal agencies, but covers statements made to state agencies or private parties, as long as the statements directly affect the functions of a federal agency.[4/] Moreover, several decisions have found liability under

[4/]See, e.g., United States v. Gibson, 881 F.2d 318, 322-323 (6th Cir. 1989) (false statements on invoices submitted to contractor that was doing work for TVA); United States v. Lawson, 809 F.2d 1514, 1518 (11th Cir. 1987) (false statements on invoices to local housing authority with respect to project partially funded by HUD); United States v. Notarantonio, 758 F.2d 777, 787-788 (1st Cir. 1985) (false statements in draw requests submitted to lender on loan guaranteed by SBA); United States v. Brack, 747 F.2d 1142, (continued...)

Section 1001 in situations, like this one, where the statements were neither made directly to a federal agency nor likely to cause a monetary loss to the federal government.[5/] Indeed, the Court in Gilliland suggested that it was just such a case that provided the impetus for the enactment of Section 1001.[6/]

[4/](...continued)
1151 (7th Cir. 1984) (false statements to sureties of loan guaranteed by SBA), cert. denied, 469 U.S. 1216 (1985); United States v. Richmond, 700 F.2d 1183, 1187-1188 (8th Cir. 1983) (false statements on invoices to county for work in connection with federally funded flood relief); United States v. Wolf, 645 F.2d 23, 25 (10th Cir. 1981) (false statements on federally required certification to purchaser of petroleum); United States v. Stanford, 589 F.2d 285, 296-297 (7th Cir. 1978) (false statements to state agency on applications for food stamps and AFDC benefits), cert. denied, 440 U.S. 983 (1979); United States v. Lewis, 587 F.2d 854, 856-857 (6th Cir. 1978) (false statements to state agency on applications for AFDC benefits).

[5/]See United States v. Green, 745 F.2d 1205, 1208-1209 (9th Cir.) (false statements to purchaser of materials regarding their compliance with federal regulations for construction of nuclear power plants), cert. denied, 474 U.S. 925 (1985); United States v. Petullo, 709 F.2d 1178, 1180-1181 (7th Cir. 1983) (affirming conviction for false statements to city entity administering federal flood relief program without requiring proof that federal funds were expended); Richmond, supra (false statements on invoices to county for work not reimbursed by federal government, in connection with federally funded flood disaster relief); Wolf, supra (false statements on federally required certification to purchaser of petroleum); United States v. Cartwright, 632 F.2d 1290, 1292-1293 (5th Cir. 1980) (false records of subsidiary of federally insured savings and loan institution); United States v. Kirby, 587 F.2d 876, 881 (7th Cir. 1978) (false statement to private parties licensed as grain inspectors by federal Department of Agriculture).

[6/]312 U.S. at 93-95 (suggesting that a purpose of Section 1001 was to provide a basis for prosecuting the presentation to private parties of false papers in connection with the shipment of "hot oil" produced in violation of state production limitations). For a good background discussion of the "hot oil" problem in another context, see United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 171-174 (1940).

The nature of the program at issue here makes it clear that petitioner's false statements were made "in a matter within the jurisdiction of" a federal agency. First, the Georgia program was set up at the instance of the federal government and conforms precisely to a detailed blueprint established by the federal government and overseen by the Secretary of Labor. For that reason, the entire Georgia program is within the "sphere of authority" of the Secretary of Labor, to use the terms of the Rodgers Court, 466 U.S. at 479. Although the federal government does not provide the benefits, neither does the State; the federal government has designed a program that is relatively cost-free to the State, with the federal government funding the administrative costs and designing a tax system to place the cost of the benefits on private parties. That relationship between the federal and state governments brings petitioner's false statements within the reach of Section 1001. United States v. Gibson, 881 F.2d 318, 322 (6th Cir. 1989) ("Courts have routinely upheld § 1001 convictions for false statements made to state or local government agencies receiving federal support or subject to federal regulation."); United States v. Petullo, 709 F.2d 1178, 1180 (7th Cir. 1983) ("A false statement may fall within section 1001 even when it is not submitted to a federal agency directly and the federal agency's role is limited to financial support of a program it does not itself directly administer.").

It also is instructive to focus on the effects of false statements of the type petitioner made. First, they lead the

Secretary of the Treasury to disburse funds to the Georgia plan administrators to cover their disbursements, even though those funds ultimately are being disbursed to an individual who is not unemployed -- a disbursement that violates 42 U.S.C. 503(a)(5) and is a "perversion of the authorized functions," United States v. Stanford, 589 F.2d 285, 297 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979), of a program designed to mitigate the effects of unemployment. Second, in light of the reporting requirements of 42 U.S.C. 503(a)(6) -- which require the State to provide reports complying with such provisions as the Secretary finds necessary to "assure the correctness" of the reports -- false statements like petitioner's will cause the state plan administrators to violate the federal statute by conveying false information to the Secretary of Labor. Cf. Bryson, 396 U.S. at 71 ("A statutory basis for an agency's request for information provides jurisdiction enough to punish fraudulent statements under § 1001."). In light of the statutory authorization to the Secretary of the Treasury to disburse to the States only funds that are "duly requisitioned," Section 1104(f), and the authority of the Secretary of Labor to stop further payments if the State fails substantially to comply with the provisions of Section 503(a), see Section 503(b)(2), the Department of Labor "has the power to exercise authority in [this] situation," Rodgers, 466 U.S. at 479. The court of appeals thus was correct in concluding

that petitioner's statements were made in a matter within the jurisdiction of a federal agency.[1/]

In reaching the opposite result, the Ninth Circuit in Facchini rested its analysis on an erroneous interpretation of the role of the Department of Labor in a state unemployment compensation program. The Facchini court concluded that the Secretary of Labor is "authorized to monitor only the administrative structure of the state program to determine whether it complies with federal requirements," and thus that "the Secretary does not have the authority to withhold certification of federal administrative funds even if a state pays fraudulent claims." 874 F.2d at 641-642. That conclusion, in turn, reflected the Ninth Circuit's reading of 20 C.F.R. 601.5(a) as preventing the Secretary from taking action when the State improperly grants benefits. Ibid. That interpretation of the regulatory scheme is in error. The pertinent statute, 42 U.S.C. 503(a)(5), makes it clear that funds from these programs can be paid out only for unemployment compensation; funds paid to a person who is not unemployed do not constitute unemployment compensation within the meaning of Section 503(a)(5). Section 503(b)(2) authorizes the Secretary to decertify a State's program

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[1/]Petitioner also suggests that Congress could not have intended Section 1001 to cover fraudulent receipt of state unemployment benefits, because 18 U.S.C. 1919 specifically covers receipt of federal unemployment benefits. Pet. 11-12. Section 1001, however, covers numerous statements also proscribed under more specific false statement statutes. See, e.g., United States v. York, 888 F.2d 1050, 1057-1059 (5th Cir. 1989) (approving conviction under Section 1001 and 18 U.S.C. 1014 for false statements to federally insured financial institutions).

if the program does not comply with Section 503(a); this power to decertify is restated in the very regulation on which the Ninth Circuit relied, see 20 C.F.R. 601.5(a)(4) (referring to and paraphrasing 42 U.S.C. 503(b)(2)). In that respect, contrary to the Ninth Circuit's characterization, the federal statutes set an eligibility requirement for compensation, which petitioner's false statements specifically were designed to circumvent.

2. Petitioner's second contention (Pet. 10-13) is that the court of appeals incorrectly determined that his false statements were "material." We disagree. As this Court recently explained,

> The federal courts have long displayed a quite uniform understanding of the "materiality" concept as embodied in [Section 1001 and similar statutes.] * * * The most common formulation of that understanding is that a concealment or misrepresentation is material if it "has a natural tendency to influence, or was capable of influencing, the decision."

Kungys v. United States, 485 U.S. 759, 770 (1988) (quoting Weinstock v. United States, 231 F.2d 699, 701 (D.C. Cir. 1956)). Thus, it is well settled that the "alleged concealment or misrepresentation need not have influenced the actions of the Government agency, and the Government agents need not have been actually deceived." United States v. Corsino, 812 F.2d 26, 30 (1st Cir. 1987) (citing cases). Petitioner does not challenge the court of appeals' invocation of that standard, but simply contends that the standard was not satisfied in this case.

Once again, petitioner relies on the Ninth Circuit's decision in Facchini. Again, however, the Facchini court's

analysis rests on a misunderstanding of the statutory program. The Facchini court concluded that the false statements at issue there were not material by reasoning that (a) federal involvement was limited to reimbursement of administrative expenditures; and (b) payment of fraudulent claims cannot affect administrative expenditures. See 874 F.2d at 644. The flaw in that reasoning is the premise that federal involvement is limited to reimbursement of administrative expenditures; as we have discussed, federal involvement is much more comprehensive. Accordingly, it is clear that petitioner's statements had the capacity to affect the actions of federal agencies, by causing the Secretary of the Treasury to make disbursements to the State from the federal trust fund, and by denying the Secretary of Labor the accurate reports from the State that are necessary for the Secretary to oversee and certify the operation of the program. Simply put, it is incongruous for petitioner to argue that it was not "material" for him to misstate his employment status when that status was the core jurisdictional fact that made him eligible for benefits from a federally designed and supervised program.[8/]

[8/]Petitioner incorrectly suggests that application of Section 1001 to him would violate the Due Process Clause. See Pet. 11 (citing Facchini, 874 F.2d at 644 (opinion of Alarcon, J., concurring)). Section 1001 applies without regard to whether the maker of the statement knew of the federal involvement. See United States v. Yermian, 468 U.S. 63 (1984). As the Court noted in a related context, that interpretation does not pose a risk of unfairness to defendants, because the individual defendant

(continued...)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

ANDREW LEVCHUK
Attorney

APRIL 1991

[8/](...continued)
knows from the very outset that his planned course of conduct is wrongful. The situation is not one where legitimate conduct becomes unlawful solely because of the identity of the individual or agency affected. In a case of this kind the offender takes his victim as he finds him. The concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum.

United States v. Feola, 420 U.S. 671, 685 (1975).

NO. 90-7163

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

DENNIS D. HERRING; PETITIONER

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT ALL PARTIES REQUIRED TO BE SERVED HAVE BEEN SERVED COPIES OF THE BRIEF FOR THE UNITED STATES IN OPPOSITION BY MAIL ON April 17, 1991.

JEFFERY C. DUFFEY
SUSAN G. JAMES
600 S. MCDONOUGH STREET
MONTGOMERY, AL 36104

Kenneth W. Starr
KENNETH W. STARR
SOLICITOR GENERAL

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SUPREME COURT, U.S.
POLICE DEPARTMENT

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April 17, 1991

M. Johnson 1858

SUPREME COURT OF THE UNITED STATES

DENNIS D. HERRING *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 90-7163. Decided May 28, 1991

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting from denial of certiorari.

The question presented in this case is the scope of federal jurisdiction under 18 U. S. C. § 1001, which criminalizes the making of false statements "in any matter within the jurisdiction of any department or agency of the United States." Petitioner was convicted under that statute for making false statements on an application for Georgia state unemployment insurance benefits. The state program is certified by the United States Department of Labor to receive federal funds which are used only for administrative expenses, not for benefits. Receipt by the state program of these federal funds entitles the Department of Labor to oversee whether the state program's administrative structure complies with federal requirements, but does not entitle it to monitor the program's operation or award of benefits. The Department of Labor is also entitled to receive information about benefit claimants as part of the certification process, but it cannot withhold certification based on the state program's payment of fraudulent claims. Petitioner's false statements were discovered during an investigation of the state program by the Department of Labor.

The trial court rejected petitioner's claim that the statute did not confer federal jurisdiction over his conduct. Petitioner then entered a conditional guilty plea and was sentenced to one year in prison, which was suspended, and two years' probation. In affirming petitioner's conviction, the

United States Court of Appeals for the Eleventh Circuit determined that its prior decision in *United States* v. *Suggs*, 755 F. 2d 1538 (CA11 1985), was controlling. See *United States* v. *Herring*, 916 F. 2d 1543 (CA11 1990). In *Suggs*, the court had held that the use of federal funds by a state agency is generally sufficient to establish federal jurisdiction under § 1001. 755 F. 2d, at 1542. The court in the instant case recognized, however, that the Court of Appeals for the Ninth Circuit has reached a contrary result on similar facts. In *United States* v. *Facchini*, 874 F. 2d 638 (CA9 1989) (en banc), that court declared that jurisdiction under § 1001 does not exist "unless a direct relationship obtains between the false statement and an authorized function of a federal agency or department," *id.*, at 641, and that because the Department of Labor has no power to control the award of state unemployment benefits, this direct relationship is lacking, *id.*, at 641–642.

Respondent United States also acknowledges the conflict between the Eleventh Circuit and the Ninth Circuit, but asserts that the issue does not merit review both because it arises infrequently and because the Justice Department has determined that it is inappropriate for the Department of Labor to investigate false statements on state applications for unemployment benefits, so that future prosecutions are unlikely. Although the Government maintains that the Eleventh Circuit was correct in determining that federal jurisdiction exists, the asserted position of the Justice Department suggests otherwise. If the Eleventh Circuit's view is indeed erroneous, then petitioner has been convicted for conduct which is not a federal crime, and for which he would not have been convicted had his prosecution arisen in the Ninth Circuit. I would grant certiorari to resolve the conflict.